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No. 86-1143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NABOR ORTEGA, AURELIO GONZALEZ,
and all other similarly situated,
Petitioners,

v.

BILL M. ROWE, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Nabor Ortega and Aurelio Gonzalez submit this reply brief in support of their petition for a writ of certiorari pursuant to Supreme Court Rule 22.5.

I. THE PETITION DOES NOT REQUIRE REVIEW OF FACTUAL FINDINGS

Respondent City of Lubbock argues that certiorari should be denied because, according to the City, the petition seeks to have this Court review the factual findings of the district court. This argument has no merit. In reaching its decision, the Court of Appeals accepted as true the allegation that "the lack of specific rules under which INS used local jails . . . led to the lamentable conditions that the detainees were

forced to endure," (Pet.App. at 7a), as well as Petitioners' description of the conditions of confinement set forth in footnote four of the Court's opinion. *Id.*[1] As the above quote makes clear, the Court also accepted as true the fact that INS' policies directly caused the conditions in the jails.[2]

Petitioners ask this Court to review the Fifth Circuit's legal conclusion: that jail conditions are not redressable under the due process clause when the policies which cause them result from negligence. This conclusion is erroneous. When government policies (or the total absence of them) have caused injury, the negligence or good faith in creating the policies is irrelevant to the existence of a constitutional violation.

The respondents also argue that Petitioners distinction between negligent policies and negligent individual conduct is illusory. To be sure, policies are implemented through individual conduct, but there is

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[1] This was necessary because the district court made no findings with regard to Respondents' policy failings. Moreover, critical findings by the district court were inconsistent. *Compare*, Pet.App. at 14a ("Although the City no longer housed its prisoners in the jail facility, it continued to provide personnel to supervise the jail as well as food maintenance and bedding"), *with* Pet.App. at 32a ("... the City was not responsible for the conditions of the jail cells. Lubbock did not operate a jail, but only agreed to allow the Border Patrol to detain illegal aliens there after apprehension ...").

[2] This is what makes this case like *Owen v. City Independence*, 445 U.S. 622 (1980), and *Pembauer v. City of Cincinnati*, ___ U.S. ___, 106 S.Ct. 1292 (1986), and unlike *Oklahoma City v. Tuttle*, ___U.S. ___, 105 S.Ct. 2427 (1985), *City of Springfield v. Kibbe*, ___U.S. ___, 55 U.S.L.W. 4239 (Feb. 24, 1987), where the causal connection between the policy and the injury was indirect at best.

a clear distinction between situations where conduct is random and individual—such as dropping a pillow or forgetting a prisoner's note—and situations where government policy is the moving force behind conduct—such as in *Owen v. City of Independence, Pembaur*, and this case. It is only the latter conduct which represents an abuse of government power.

II. THAT RESPONDENTS SHOULD HAVE KNOWN OF THE PROBLEMS IN THE JAIL, AND DID NOT, CONSTITUTES DELIBERATE INDIFFERENCE

Petitioners argue that Respondents' actions amounted to deliberate indifference because they should have known that their blind neglect would lead to the deplorable conditions which existed in the jails. In reply, the Federal Respondents claim that Petitioners' should have known argument is "a classic restatement of a negligence standard." Brief for Resp. at 7. While this is true, negligence and deliberate indifference are not mutually exclusive. As discussed in detail by the court in *Doe v. New York City Department of Social Services*, 649 F.2d 134, 143-145 (2nd Cir. 1981), the difference between the two is a matter of degree. The more extreme the negligence the more appropriate it is to characterize it as deliberate indifference. Moreover, actual knowledge of the consequences of one's actions is not necessary to establish deliberate indifference. Deliberate indifference may be inferred where the risk of injury is known and no action is taken to ameliorate that risk, or where there is a pattern of inattention to a known duty to safeguard persons in one's care. *Id.* at 145. *Cf. Davidson v. Cannon*, 106 S.Ct. 668, 673 n. 2 (1986)(Blackmon, J., dissenting)("In some circumstances, the risk of injury is so high that the govern-

ments's failure to make efforts to avoid the injury is unacceptable, even if the omission still might be characterized as negligence); *Smith v. Wade,* 461 U.S. 30 (1983).

Incarcerating persons in a jail is obviously a dangerous activity—those incarcerated have effectively lost their ability to protect themselves—and the duty to assure that someone is in charge of a jail before leaving prisoners there is also obvious. In these circumstances, blindly assuming away one's responsibility for detainees must be seen as more than mere negligence; it evidences reckless and deliberate indifference for the rights and safety of detainees.

III. CURRENT INS JAIL POLICIES ARE INADEQUATE

According to the Federal Respondents, certiorari should be denied because Petitioners challenge past jail conditions which have been superceded by new INS jail use guidelines, issued in November 1982. Of necessity, Petitioners' evidence was limited to jail conditions as they existed at or before the time of trial, but that does not mean that Petitioners challenge only past jail conditions. Petitioners presented ample evidence to show that the unconstitutional jail conditions caused by Respondents' jail use policies continued for many years and would be likely to recur in the future absent injunctive relief. The November 1982 INS guidelines, which were the subject of considerable testimony at trial, only highlight the continuing need for injunctive relief.

The only jail expert to testify at trial[3] stated that INS' November 1982 guidelines were totally inade-

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[3] Arnold Pontesso was warden of the Federal Reformatory at

quate to protect detainees. Those guidelines still do not correct many of the problems which led to the confusion and deplorable conditions in Lubbock. They still do not require a written contract with local authorities or any written statement setting forth the division of responsibilities between INS and local authorities. The guidelines contain no provision for monitoring or limiting overcrowding of cells by INS agents. They do not even allow INS to keep a record of how many beds each jail has available for use by INS. Perhaps most shocking, while the new guidelines prohibit the use of jails which have failed a fire inspection, they authorize the use of jails which have never been inspected for fire safety or which are not subject to fire inspections.[4]

Plainly the November 1982 guidelines have done nothing to eliminate the problems raised by this suit, problems which affect INS' use of local jails throughout the country. Given the continuing national significance of the issues raised by this suit, it is appropriate to grant certiorari.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, the Court should grant the

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El Reno, Oklahoma and Director of Corrections for the State of Oklahoma. Prior to this case he testified as a jail expert for the U.S. Department of Justice. He was called by Petitioners; neither INS nor the City called a jail expert or a jail administrator to testify.

[4] This is a problem in city jails in small towns where local fire codes are limited or non-existent. E.g. The only fire code provision applicable to the city jail in Dalhart, Texas, a jail frequently used by INS, prohibits the burning of trash outdoors.

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Respectfully submitted,

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